UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DANIEL O. ASBELL
United States Air Force

ACM 34839

10 January 2003

Sentence adjudged 16 August 2001 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Sharon Shaffer.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Jeffrey A. Vires and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Martin J. Hindel.

Before

BURD, EDWARDS, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

EDWARDS, Judge:

Pursuant to his pleas, the appellant was convicted of two specifications of dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892. Contrary to his pleas, he was also convicted of three other specifications of dereliction of duty in violation of Article 92, UCMJ. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant now alleges that the evidence is legally and factually insufficient to support a finding of guilty with regard to Specifications 3 and 4 of the Charge[1] and that "[t]he finding of guilty to [S]pecification 4 is the equivalent of no finding because it is vague and ambiguous in that it fails to reflect what facts constitute the offense." Finding no error that materially prejudices the appellant's substantial rights, we affirm. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Facts

At the time of the offenses, the appellant was assigned as a corrections supervisor (prison guard) at the confinement facility at Keesler Air Force Base (AFB), Mississippi. The appellant's brief tenure as a corrections supervisor lasted from late October 2000 until mid-December 2000. The appellant worked mainly on the mid-shift that began at 2200 and ended at 0600. During this time, there were between 15 and 19 inmates in the Keesler AFB confinement facility, 4 of whom were females. As the mid-shift corrections supervisor, the appellant was the sole security forces member working in the confinement facility. There was also a non-security forces female airman present who worked as the female escort.

During his time as a corrections supervisor, the appellant engaged in sexual intercourse with one of the female inmates on divers occasions and failed to prevent prisoners of the opposite sex from communicating with one another.[2] The appellant also failed to prevent prisoners of the opposite sex from engaging in sexual intercourse with one another, failed to prevent a male inmate from entering the female bay area, and failed to report an allegation of sexual assault from a female inmate to his superiors.[3] All of these offenses were in violation of his duty as a confinement supervisor.

Legal and Factual Sufficiency

The appellant alleges that the evidence is legally and factually insufficient to support a finding of guilty as to Specifications 3 and 4 of the Charge. We have fully considered this allegation and find it to be without merit. *United States v. Washington*, 57 M.J. 394 (2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Vague and Ambiguous Findings

A male airman in the confinement facility was alleged to have sexually assaulted two female inmates on the evening of 4 December 2000. The appellant was aware of the allegations and yet, contrary to his duty requirements, failed to report the allegations to

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] The appellant plead guilty to these two offenses (Specifications 2 and 5 of the Charge).
[3] The appellant plead not guilty, but was found guilty by officer members of these three offenses (Specifications 1, 3, and 4 of the Charge).

his superiors. Specification 4 of the Charge alleges that the appellant willfully failed to report "an allegation of sexual assault from a female prisoner." The appellant argues that the findings of the court were unclear and ambiguous, and must therefore be set aside, because there was evidence of two sexual assaults upon two separate female inmates on the night in question. We disagree.

> Where several similar offenses are charged in the same specification,
>
> > [A]n accused may have difficulty in preparing his defense; may be exposed to double jeopardy; and may be deprived of his right to jury concurrence concerning his commission of the crime. However, an election [by the government as to which offense is being prosecuted] has not been required where offenses are so closely connected in time as to constitute a single transaction.

United States v. Vidal, 23 M.J. 319, 325 (C.M.A. 1987) (citations omitted). In this case, the offenses (if you accept the appellant's argument that there were two separate offenses) took place at the same time. The failure by the appellant to report both sexual assaults occurred at the same time. Under the appellant's theory, the government should have charged the appellant with two separate offenses of dereliction of duty – one for each sexual assault that he failed to report. As our superior court so aptly stated in *Vidal*, "[w]e need not decide whether the two separate [derelictions] could properly have been alleged as two separate [offenses]. However, certainly we shall not penalize the Government because it did not allege two separate [offenses]." *Id.* at 325-26.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court